segment historically was considered a natural monopoly. 42/ Regulators focused on enabling competitive providers of long distance service -- which is a much larger and more significant market segment in the US than in the UK 43/ -- to use the local monopoly infrastructure through measures such as divestiture, access charges, long distance carrier selection via 1+ dialing or presubscription, and so on. Only recently has US law permitted competition in local telephony.

Although Congress and the Commission concluded that unbundling of the local loop is a vital component of US telecommunications policy which encourages the use of the incumbent's network to facilitate market entry, OFTEL adopted a different policy based on UK market conditions and the objectives of its government. Because the UK government has successfully promoted the development of alternative local infrastructures (with non-BT local loops and other local network facilities covering a vastly higher percentage of UK customers than do any similar competitive systems in the US), OFTEL has determined not to

---

42/ See United States v. AT&T, 552 F.Supp. 131, 186, 223-24 (D.D.C. 1982) aff'd. sub nom. Maryland v. United States, 460 U.S. 1001 (1983) (describing growing competition in interexchange market, as opposed to "natural monopoly" for local telephone service). Divestiture of the Bell system, the restriction on interLATA service by the RBOCs, and the access charge regime all were premised on facilitating long distance competition in an environment of local monopoly, and on preventing the local monopolists from extending their market power into the long distance business.

43/ The UK is geographically far smaller than the US; a substantial percentage of the UK population and business activity is concentrated in greater London with no real analog to the US market; and the population density of the UK is far greater than the US.

require local loop unbundling. OFTEL believes that at this stage such unbundling could reduce these carriers' incentives to continue building their local facilities and undermine the value of new entrants' sunk investments. 44/

The success of OFTEL's policies to date is notable. Carriers other than BT account for about forty percent of the total expenditure for telephone service from large businesses, and nine percent of total local service revenue; carriers other than BT provide twenty-five percent of business lines. Today, one-third of residential subscribers can subscribe to local exchange service provided by other carriers. 45/ Moreover, based almost entirely on indirect access, resale-based carriers had already garnered, by the end of June 1996, a twenty-two percent share of the UK business market for international calling. 46/ In addition, BT believes that over half of Mercury's twenty-three percent share of the same market is accounted for by its indirect access customers. This suggests that about thirty-four percent of the international direct dial ("IDD") business is currently held by indirect access operators.47/ This is hardly consistent with AT&T's contention that the

---

44/ Nevertheless, any party that believes that some feature of the US regulatory regime should be imported into the UK in a way that would promote competition is free to raise such matters with OFTEL. OFTEL consults widely within the industry and the broader public, and operators should make use of the opportunities afforded to argue their case.

45/ See Application, vol. One at 28-29.

46/ TISC Submission at ¶¶ 9-10, Table 3.

47/ BT believes that indirect access operators had about 10% of the business for residential IDD at the end of June 1996, but that this share is growing rapidly.

absence of equal access deprives carriers of viable opportunities to compete for UK-US outbound service. 48/ Contrary to AT&T's characterizations that OFTEL "limit[s] the ability of competitors to compete effectively" and deprives competitors of "a viable business opportunity," 49/ the results show that OFTEL's approach is a reasonable and effective policy choice for the UK.

In short, the Commission's review of this Application should not turn on any judgment as to whether the US or UK approach to competitive telecommunications is superior. The two approaches, though remarkably similar in goals, are somewhat different in means. Nonetheless, the UK approach is reasonable and appropriate to its state of competitive development and its geographic, legal, and historical facts and circumstances. 50/ Most importantly for

---

48/ AT&T at 22. OFTEL has taken a number of steps beyond requiring indirect access in fostering the development of long distance carriers which have no local service offerings or infrastructure. For example, it required BT to interconnect with stand-alone long distance carriers at cost-based rates, waived the application of access deficit contributions ("ADCs") to such carriers, and later eliminated ADCs altogether. Not only have ADCs been abolished, but indirect access operators pay nothing at all for the use of BT's local loop: the under-recovery of costs from exchange line rentals falls entirely to BT to make up from its retail call charges. In addition, US carriers entering the UK market are not required, as is BT, to set nationally averaged call charges, publish and adhere to them; and, unlike BT, are free to offer narrowly targeted discounts or to do individual deals with customers.

49/ AT&T at 22-23.

50/ Moreover, UK authorities do not refuse entry to US companies even though US access charges constitute a substantial barrier to entry and distortion of US local and long distance markets. Unlike UK interconnection charges, US access charges are not based strictly on traffic-sensitive costs, but include local loop and other market-distorting surcharges.

the Commission's review of this Application, the UK approach has produced the legal and factual conditions required for the FCC to find that the UK fully meets the ECO test. 51/

3. Competitive Safeguards in the UK Protect Against Anti-Competitive Practices

The Application demonstrated that BT's UK operations are governed by a comprehensive set of UK and EU "competitive safeguards" that "protect new entrants against potential abuses of market power and 'anti-competitive practices.'" 52/ Nevertheless, Sprint, DT, and FT ("the Global One parties") would

---

51/ While BT has already implemented local number portability (for so-called "geographic" numbers) pursuant to OFTEL mandate, AT&T and ACC also ask the FCC to require OFTEL to accelerate its timetable for BT to implement number portability for non-geographic (i.e., 800 type) dialing codes. AT&T at 26-27; ACC at 9-10. Condition 34C.1(a) of BT's Licence obliges BT to provide number portability in accordance with OFTEL specifications. The provisions governing various types of non-geographic portability ("specially tariffed services"), including 0800 and 0345, are expected to be finalized in the next two months, following which BT will be obliged to introduce portability of such non-geographic numbers. Trials of non-geographic portability are due to commence in May, and BT expects the commercial service to be introduced later in 1997. Charges for the BT service will be determined by OFTEL, as they have been for geographic portability.

52/ Foreign Carrier Entry Order, 11 FCC Rcd at 3894. The Applicants showed how BT is subject to all three of the competitive safeguards that the Commission considers to be important: "(1) . . . cost-allocation rules to prevent cross-subsidization; (2) timely and nondiscriminatory disclosure of technical information needed to use, or interconnect with, carriers' facilities; and (3) protection of carrier and customer proprietary information." Id.

In addition, a host of other governmental safeguards augment a regulatory regime that protects new US and other competitors in the UK telecommunications industry by preventing BT from engaging in anti-competitive activity. See Application, vol. One at 44-51. In light of these existing safeguards, WorldCom's request for a "clear procedure under which competitors can obtain redress" is superfluous. WorldCom at 9. The Applicants have demonstrated that OFTEL and

[Footnote continued]

impose on the Applicants structural, accounting and reporting requirements which are burdensome and unnecessary. 53/ The Application already specifies that MCI will be a subsidiary of the new Concert separate from BT. MCI Section 214 authorizations will not be held by Concert, as DT mistakenly assumes. 54/ They will be held by the same subsidiaries of MCI that hold them today. 55/ Any future significant change to this structure would be preceded by additional applications for authority under Section 214, or for Commission approval of appropriate transfer or assignment of license applications. The license condition sought by the Global One parties would be duplicative of these existing requirements that already give the Commission the power to investigate and address, if necessary, any future change to this structure. Special restrictions should not be imposed on the Applicants'

[Footnote continued]

the Commission already have sufficient procedures in place. No party takes issue with any of these facts, nor is there any assertion that the UK fails to meet this standard under the ECO test.

53/ Sprint would require MCI to be a separate corporation from all other subsidiaries of the new Concert, with all agreements between MCI and Concert or its subsidiaries which affect US traffic or revenues publicly filed and the terms made available to US competitors of MCI. Sprint at 8. DT and FT would carve up BT and MCI into three entities: MCI US domestic, BT UK domestic and an entity that would run the international operations. Customers would be required to contract separately with each company for service on the US-UK route. DT at 12; FT at 6. The Global One parties argue that organizational, reporting and accounting requirements are necessary to prevent "possible anti-competitive and discriminatory behavior." See, e.g., Sprint at 9; DT at 11-12; FT at 5.

54/ DT at 12.

55/ See Application, vol. Two, Sections C-I.

ability to adjust their organizational structure to respond to future market conditions. 56/

Rules are already mandated by OFTEL that prohibit BT from subsidizing its competitive operations from its local service, and rigorous cost allocation procedures ensure compliance. 57/ And, BT Licence conditions require nondiscriminatory treatment by BT of its competitors. 58/ The Commission should

---

56/ DT's and FT's baseless arguments for a separate subsidiary plan to ensure continued compliance with the International Settlements Policy ("ISP") are discussed below. See infra text accompanying notes 66-69.

57/ Condition 20B of BT's Licence requires BT to maintain separate accounting records for its Access Business, Network Business, Retail Systems Business, Apparatus Supply Business, Supplemental Services Business and Residual Business (and certain subdivisions of some of these businesses). BT is required to publish annual (and interim) audited financial statements for each of them. BT's Supplemental Services Business (which broadly covers BT's enhanced service operations) is required to purchase its services at nondiscriminatory published rates from the Retail Systems Business, which purchases the underlying network capabilities from the Network Business, as appropriate. See Network Charges from 1997 at ¶ 1.4. OFTEL has wide powers to investigate and issue directions to BT concerning cross-subsidy of those businesses. See BT Licence Condition 20B.15; see also Subsidy of BT's Managed Network Services Business, Director General of the Office of Telecommunications (Feb. 1996).

58/ Conditions 13 (Interconnection), 16 (Publication of charges and terms, 16A (publication of interconnection agreements), 16B (Standard services), 17 (Prohibition on undue preference and discrimination), 17A (Differential charging), 17B (Prohibition on undue preference and discrimination in quality of service), and 18 (Prohibition on cross-subsidies) all ensure against discrimination under the watchful eye of OFTEL. Sprint erroneously claims that the UK "lacks any provision for interconnection tariffs." Under Condition 13 and 16A of BT's Licence, BT publishes nondiscriminatory, cost-based interconnection terms and conditions. See Section II.A.2 supra; Application, vol. One at 24-27. The Global One parties' requests that the Commission impose requirements protecting confidentiality of customer and competition information is also fully covered by OFTEL regulation. See Application, vol. One at 46-48; Sprint at 8; DT at 14; FT at 20-21.

not extend its authority to cover UK jurisdictional matters that OFTEL has well in hand.

4. The UK Has an Effective Government Regulator

There is no question that the UK has an effective and independent telecommunications regulator in OFTEL, as both the Commission and commenters in this proceeding acknowledge.

On December 31, 1996, a powerful new OFTEL regulatory tool came into force: the Fair Trading Condition (Condition 18A) on BT's Licence. 59/ Condition 18A broadly prohibits any act or omission that could prevent, restrict or distort competition. When OFTEL suspects a violation, it may, either sua sponte or in response to a complaint, issue an order which takes immediate effect. OFTEL has concluded that this provision will enable it "to deal speedily and effectively with anti-competitive behavior, whatever form it takes." 60/

59/ The UK High Court confirmed the lawfulness of the Fair Trading Condition on December 20, 1996. Condition 18A provides in relevant part:

> The Licensee shall not do any thing, whether by act or omission, which has or is intended to have or is likely to have the effect of preventing, restricting or distorting competition where such act or omission is done in the course of, as a result of or in connection with, providing telecommunication services, or any particular description of telecommunication service, or running a telecommunication system.

60/ Pricing of Telecommunications Services From 1997, Director General of the Office of Telecommunication at ¶ 3.1 (March 1996) (available at http://www.open.gov.uk/oftel/pri1997b/chap3.html).

No one can doubt OFTEL's commitment and authority to ensure a truly competitive UK telecommunications market. Thus, the FCC should not attach conditions to the merger that duplicate OFTEL's effective regulation. 61/

5. Other Considerations

a. MCI and BT Are Cooperating in the Approval Processes Necessary to Assure Protection of US National Security Interests

Both the Department of Defense and the FBI filed comments on the merger application, indicating that national security or law enforcement issues should be resolved before the Commission concludes that the merger serves the public interest. MCI and BT agree. MCI and BT voluntarily have initiated all of the approval processes needed to ensure that US national security interests are protected in a post-merger environment, and to ensure that MCI can continue to

---

61/ Two parties raise concerns relating to Section 310(a) of the Communications Act because the UK government holds a special share in BT giving the government a right to appear (but not to vote) at shareholder meetings, and to approve any change in the BT by-laws requiring the BT chairman to be a UK citizen and prohibiting any single shareholder from holding more than 15 percent of BT's shares. WorldCom at 19; BellSouth/PacTel/SBC at 19. The suggestion is ludicrous that these provisions make BT a "foreign government," controlled by a foreign government, or "a representative thereof." As the Commission has recognized, BT is a public corporation controlled by its shareholders. BT/MCI, 9 FCC Rcd 3960, 3960 n.3 (1994) (noting that the UK government then held no more than 1.5 percent of BT's issued share capital); cf. TNZL Order at ¶ 25 (concluding that the New Zealand government's "Kiwi Share" -- which provides voting rights similar to the "Golden Share" -- is irrelevant to ECO considerations). The special share provisions function in a manner similar to the Exon-Florio process in the US, giving the government an opportunity to review the national security implications of a major investment or change of control. See Defense Production Act of 1950, 50 App. U.S.C. § 2170.

participate in bidding for government telecommunications contracts. The Applicants expect to receive all approvals prior to Commission action on the Application, and will keep the Commission apprised of the status of these national security coordination matters.

b. There Is No Basis For Conditioning the Merger on TSLRIC-Based US/UK Accounting Rates

AT&T also asserts that the Commission should compel BT to charge US correspondents TSLRIC-based settlement rates for terminating calls in the UK. AT&T argues that US carriers not affiliated with BT will suffer from "competitive distortion" if the merger is approved and if sometime thereafter the US-UK proportionate return policy is relaxed by the Commission pursuant to its Flexibility Order. The fundamental premise of AT&T's claim is that BT would be allowed to divert a disproportionate amount of its traffic to MCI, while AT&T would have "no viable alternative" but to terminate the bulk of its US-bound traffic pursuant to above-cost accounting rates. AT&T concludes that the immediate achievement of TSLRIC-based rate levels is necessary to prevent distortion on the US-UK route.

AT&T's arguments ignore the existence of effective competitive opportunities in the UK, which constrain the ability of foreign carriers to distort competition in the US international services market, and have already yielded accounting rates that are among the lowest in the world. 62/ In any event, the

---

62/ The Commission has proposed consideration of an "accounting rate benchmark test" as a supplement to, or replacement for, the ECO test. See generally, International Settlement Rates, Notice of Proposed Rulemaking, IB

[Footnote continued]

Applicants do not dispute that low settlement rates will reduce the potential for competitive distortion by some new entrants into the US market, where competitive delivery alternatives are not available. The Commission has proposed several methods of calculating benchmark rates that may be used in the future to address competitive distortion. In the case of BT, the settlement rate currently charged to US carriers compares favorably with every Commission proposal -- it approaches cost and is below both the applicable average benchmark for the first tier of countries and the UK country-specific benchmark rates. Moreover, BT's US-UK accounting rate is subject to ongoing negotiations with US carriers that may result in further reductions. Thus, under the "overall public interest analysis" that supplements the ECO test, BT's accounting rate practices weigh strongly in favor of approving the merger. 63/

[Footnote continued]

Docket No. 96-261 at ¶ 78 (released Dec. 19, 1996). The Commission is only in the initial stages of considering such a test, however, and has not proposed that foreign carrier entry be conditioned on meeting a TSLRIC test.

63/ In its Foreign Market Entry Order, the Commission said that, "[w]e would consider an accounting rate level favorable if it is among the lower accounting rates which US carriers have with foreign carriers" even if it is not "determine[d] precisely . . . [to be] 'cost-based.'" 11 FCC Rcd at 3901 n.72. BT's accounting rates are unquestionably "among the lower" rates US carriers have with foreign carriers and are well within the Commission's benchmarks. See BT North America Inc., 10 FCC Rcd 3204, 3205 (1995) (citing Regulation of International Accounting Rates, 7 FCC Rcd 8040 (1992)). Additionally, the US practice of disclosing "the accounting rates the carrier maintains with carriers in other countries" is a further "favorable factor" under the Foreign Carrier Entry Order's public interest analysis. The UK is the only country other than the US that publishes international accounting rates. See International Accounting Rates, Director General of the Office of

[Footnote continued]

It is also important to consider that in the UK competition has progressed well beyond the minimum requirements to pass the Commission's ECO test. US carriers have the ability to send UK-destined traffic to AT&T UK, Mercury and other US-owned international facilities licensees, who already have ownership rights or can readily obtain IRUs in the UK-end of undersea cables. 64/ These licensees, in turn, can terminate traffic to BT customers at interconnection rates which are cost-based and nondiscriminatory, and which from August 1, 1997 will be based on LRIC. Moreover, AT&T ignores its own ability to self-deliver its US-bound traffic, at the same costs in the US as those incurred by BT (or less, in light of the newer, more efficient technologies that may be employed). 65/ Indeed, given AT&T's commanding lead in US outbound volumes, AT&T can use its large

---

[Footnote continued]

Telecommunications (Dec. 1996) (showing BT's and Mercury's rates with all countries).

64/ See notes 20-24 supra and accompanying text; Network Charges from 1997.

65/ As the FCC recognized in Reevaluation of the Depreciated Original Cost Standard in Setting Prices for Conveyances of Capital Interests in Overseas Communications Facilities Between and Among U.S. Carriers, 7 FCC Rcd 4561, 4563 (1992) aff'd. on recon., 8 FCC Rcd 4173 (1993), "[m]any cables have multiple U.S. owners and carriers may acquire IRUs from competing sources within the same cable." Indeed, AT&T fails to acknowledge that, as the largest member of the TAT 12/13 consortium, it already owns more unutilized whole US-UK cable circuits than any other consortium member. BT believes that AT&T already owns sufficient whole circuit capacity in TAT 12/13 to be able to terminate all of its own traffic in the UK, if it chose to do so. See note 12 supra and accompany text.

scale buying power and economies of scale and scope to lower the cost of its other inputs, which give AT&T significant cost advantages.

Finally, AT&T's concern about what might happen if the US-UK proportionate return rules and International Settlement Policy ("ISP") were to be relaxed in the future 66/ -- and the similar claims of DT and FT that structural safeguards are needed to ensure MCI's and BT's compliance with the ISP 67/ -- are misplaced in the short term and, in the longer term, are antithetical to the pro-competitive thrust of the Commission's Flexibility Order. 68/ As AT&T is well aware, the services offered by MCI and BT -- as well as other carriers -- will continue to be governed by the ISP and proportionate returns rules unless and until the Commission approves an alternative arrangement after a public notice and comment period in which AT&T and other competitors will be free to participate. 69/

66/ AT&T at 15.

67/ DT at 12; FT at 10-11.

68/ Regulation of International Accounting Rates, CC Docket No. 90-337, Phase II, Fourth Report and Order, FCC 96-459 (released Dec. 3, 1996) ("Flexibility Order").

69/ Likewise, the reorigination issue raised by AT&T is an industry-wide matter properly considered, if at all, in a separate rulemaking proceeding. AT&T at 7, 19-21, 31.

No special license conditions are necessary to enable the Commission to enforce these obligations. 70/ The Applicants are not proposing to implement any alternative settlement arrangements or to diverge from the ISP pursuant to the Flexibility Order. If and when they do so, there will be time enough for the Commission to consider all issues relating to such a proposal. There is no warrant, however, for a license condition uniquely locking MCI into adherence to the ISP and the proportionate return rules, particularly given the elaborate procedures established by the Commission to consider alternative arrangements requests. As competition grows on the US-UK route, the need for strict adherence to the ISP will dissipate, and the FCC will presumably relax the ISP rules under appropriate circumstances for the reasons articulated in the ISP Flexibility Order. The preclusive conditions proposed by AT&T, DT and FT are completely at odds with the Commission's stated desire, where possible, to encourage development of a "separate, competitive market for [US] termination services" and to move away from the bundling of inward and outward-bound markets [that] can discourage competition." 71/

70/ Indeed, the "no special concessions" rule applies to all carriers providing services under Section 214. 47 C.F.R. § 63.14. The "no special concessions" provision applies whether services are provided by MCI itself or by some other entity as part of some future reorganization. The Applicants have certified their adherence to these rules, pursuant to 47 C.F.R. § 63.18(i). See Application, vol. Two, Section A.

71/ Flexibility Order at ¶ 19.

c. There is No Relationship Between the Merits of This Application and the RBOCs' Section 271 Applications

Several of the Regional Bell Operating Companies ("RBOCs") argue that the Commission should link the BT-MCI merger with federal policies governing RBOC in-region long distance entry, alleging that it is inequitable to grant the merger application without also granting RBOC applications for in-region entry into long distance. 72/ Some of the RBOCs even suggest that MCI should somehow be estopped from making certain arguments in the Section 271 context because of the arguments presented in the context of this Application. 73/ The Commission should reject these contentions for several reasons.

First, RBOC in-region entry is governed by detailed standards in Section 271 of the 1996 Act. In contrast, the US statutory and policy framework governing foreign entry into US markets under Sections 214 and 310 of the Communications Act is a more general, incentive-based regime designed to encourage foreign jurisdictions to privatize and open their markets to competitive forces. 74/ The ECO test does not and should not require adherence to Section 271

72/ BellSouth/PacTel/SBC at 1, 24; Bell Atlantic at 1-2, 6.

73/ US West at 3; Bell Atlantic at 6.

74/ The fact that Congress considered and rejected major amendments to Section 310, but adopted the detailed Section 271 regime, indicates Congress had the opportunity to adopt the Section 271-like approach to foreign ownership in the 1996 Act, but did not. See H.R. Conf. Rep. No. 204, 104th Cong. 1st Sess. 120-22 (1995) (discussing regime for foreign investment similar to ECO test).

requirements for opening incumbent networks for a simple reason -- different nations have embarked upon market-opening strategies at different stages in industry development, and face very different market structures than in the US. As discussed above, 75/ the Commission should not impose on another nation the particular elements of public policy designed to address a set of regulatory circumstances specific to the US.

Second, a key difference between the US and UK markets is that local competition in the UK is far more substantial than in the US. BT's position at the local level has been declining rapidly since 1993, when cable operators first started to build out their networks and offer telephony service to local customers (now covering more than one-third of residences).

Third, the 1996 Act 76/ and Commission decisions 77/ recognize that the issues raised when an incumbent local carrier seeks to enter long distance markets outside the region in which it provides local service, such as BT's investment in MCI, are less difficult than those raised when such a carrier seeks to

---

75/ See Section II.A.2.b.ii. supra (discussing UK pro-competitive decisions on interconnection).

76/ Compare 47 U.S.C. § 271(b)(2) (permitting RBOCs to provide out-of-region interLATA services without any prior showing) with 47 U.S.C. §§ 271(b)(1), (c)-(d) (requiring RBOCs to make very substantial showing before being allowed to provide in-region interLATA service).

77/ Bell Operating Company Provision of Out-of-Region Interstate, Interexchange Services, FCC 96-288 (released July 1, 1996).

enter long distance markets within their home regions. The incentives for an incumbent carrier to engage in anti-competitive behavior, and its ability to do so, are greater in the in-region context than they are in a case like this. 78/

For all of these reasons, the Commission should reject the RBOCs' unjustifiable attempt to make this Section 214 and Section 310 application proceeding a forum for airing their policy differences with MCI under the 1996 Act.

B. The Effective Competitive Opportunities Test Does Not Apply to the DBS License Held by MCI Telecommunications Corporation

Two petitioners, Time Warner and Primestar, oppose the transfer of control of MCI subsidiary MCI Telecommunications Corporation ("MCIT"), a licensee in the DBS service. 79/ Because the Commission's International Bureau has already rejected petitioners' foreign ownership arguments, and because such

---

78/ Moreover, BT already (1) provides international services to the US originating and terminating in the UK, and (2) has authority to provide services that would be considered in-region services that an RBOC could not provide in the US without satisfying the Section 271 test. To be sure, the merged entity would provide private line and 800 services that would be considered in-region services under Section 271(j). But the fact remains that BT is already vertically integrated into the business of international telecommunications services, and that -- as discussed above -- BT has for several years provided these services through an alliance with MCI without any hint of favoritism or preference.

79/ Those petitioners contend that the proposed transfer of MCIT's DBS authorization is subject to an ECO test with respect to both the UK (as the home market of the proposed transferee) and Australia (the home market of The News Corporation Limited, a joint venturer with MCIT in American Sky Broadcasting ("ASkyB"), the entity that will provide the DBS programming service over MCIT's satellite).

restrictions are not applicable in any event to video programmers, there is no basis for the Commission to use the ECO test in reviewing BT's acquisition of MCIT's DBS authorization.

The International Bureau has determined that the foreign ownership provisions of Section 310(b) of the Communications Act and Section 100.11 of the Commission's Rules do not apply to a DBS licensee (such as MCIT) offering a subscription programming service. 80/ The Bureau correctly recognized that the Commission's Subscription Video decision classified subscription DBS as a "non-broadcast" and "non-common carrier" service 81/ to which the restrictions of Section 310(b) by their own terms do not apply, and that the Commission's codification of this provision in its rules was not intended to extend beyond the statutory proscription. 82/ Because the foreign ownership restrictions do not apply in this

---

80/ MCI Telecommunications Corp., DA 96-1793 at ¶¶ 16-27 (IB, Dec. 6, 1996).

81/ Subscription Video Services, 2 FCC Rcd 1001, 1007 (1987), aff'd. sub nom., National Ass'n for Better Broadcasting v. FCC, 849 F.2d 665 (D.C. Cir. 1988). Although Primestar asserts that the Commission's strict adherence to the mandates of Section 310(b) for PCS applicant NextWave cannot be squared with the Bureau's "disregard" for foreign ownership in the subscription DBS service, the fact is that Congress defined PCS by statute as a common carrier service, see 47 U.S.C. § 332(c)(1), leaving no doubt as to the applicability of Section 310.

82/ Several parties, including Primestar, have filed applications for review of that order. MCI has briefed the issue fully in the review proceeding and the January 21, 1997 Consolidated Opposition of MCI Telecommunications Corporation (FCC File No. 73-SAT-P/L-96) is incorporated herein by this reference. For present purposes, it is sufficient to note that the Bureau's decision accurately reflects federal law and Commission policy, should be upheld on review, and is at this point dispositive of the issue. See 47 C.F.R. § 1.102(b) (actions taken upon delegated

[Footnote continued]

context, the proposed transfer of MCIT's DBS authorization does not implicate the ECO test. 83/

Although Time Warner and Primestar argue that the Commission should consider foreign ownership of ASkyB (the DBS programmer) in making its public interest determination under Section 310(b), there is no provision of the Communications Act nor any Commission rule that applies foreign ownership limitations to any entity other than a Commission licensee. Consequently, the Commission does not concern itself with foreign ownership of non-licensee parties using US-licensed facilities. 84/

[Footnote continued]

authority are effective upon release unless Commission stays effect until review is completed).

83/ Time Warner also argues that Section 335 of the Communications Act (enacted after Subscription Video), which directs the Commission to impose upon DBS operators certain public service obligations, evinces congressional intent to impose on DBS licensees the full panoply of broadcast regulation, including foreign ownership limitations. Time Warner at 6-7 (discussing 47 U.S.C. § 335). However, to the contrary, the fact that Congress felt compelled to enact a statute specifically subjecting all DBS licensees to certain enumerated broadcast obligations demonstrates its understanding that DBS operators were not already subject to broadcast obligations in general.

84/ In the satellite services, for example, licensees are free to sell or lease transponders to third parties subject only to the requirement that the transaction will not unduly reduce the number of transponders available on a common carrier basis; licensees are under no obligation to disclose any information as to the ownership of the purchaser or lessor. See Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems, 10 FCC Rcd. 7789, 7795 (1995) (discussing Commission's transponder sales policy. See also Univision Holdings, Inc., 7 FCC Rcd. 6672 (1992) (licensing broadcast affiliates of foreign-owned network

[Footnote continued]

This observation applies beyond the DBS service: No law or regulation imposes foreign ownership limitations on any non-licensee Multi-Channel Video Programming Distributor ("MVPD") -- including cable operator/programmers such as Time Warner 85/ and Direct-to-Home ("DTH") operators such as Primestar. Yet without citing any authority for doing so, those parties would have the Commission apply such limitations to DBS operators, curtailing involvement by foreign investors and thereby restricting the sources of capital available in this highly capital-intensive and competitive industry. 86/ Changing the DBS rules after the

---

[Footnote continued]

programmer since focus of inquiry is directed to control of stations, not programmer).

85/ Time Warner owns 100% of the Cartoon Network, Cinemax, CNN, CNN International, CNNfn, HBO, Headline News, TBS, TNT, and Turner Classic Movies, and also holds significant interests in a number of other programmers. Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Third Annual Report, FCC 96-496 at Appendix G, Table 1 (Jan. 2, 1997).

86/ It is instructive to compare Primestar's position in this case, in which it finds that the Act "[u]nquestionably" gives the Commission authority to regulate DBS programmers in addition to DBS licensees, with its position in the 1993 proceeding to adopt public interest obligations for all DTH satellite service providers, wherein it asserted: "There is no suggestion in the statute that Congress intended to extend Title III radio licensing requirements to channel lessees that have no control over electromagnetic spectrum." Comments of Primestar Partners L.P., MM Docket No. 93-25 at 9 (filed May 24, 1993). If, as Primestar asserts, DBS is essentially like all other MVPD services, there would be no logical basis for confining this precedent to DBS programmers. Primestar at 11. Accordingly, were the Commission to apply foreign ownership restrictions to programmers across all MVPD delivery systems, it would take an unprecedented and highly regulatory step that would not only implicate First Amendment concerns but also threaten the settled expectations of companies such as Alphastar -- a Canadian-owned company

[Footnote continued]

fact would constitute impermissible retroactive rulemaking, would be highly inequitable as to MCIT and would call into question the regularity of the Commission's auction procedures -- potentially decreasing revenues in future auctions.

Finally, even if the Commission were to apply the ECO-Sat test to the MCIT DBS licensee, it would find that the United Kingdom -- BT's "home market" -- in fact offers effective competitive opportunities to US-licensed satellites. 87/ Nevertheless, Time Warner and Primestar contend that restrictions contained in the EU's Television Without Frontiers Directive ("TVWF") erect de facto barriers that stymie effective competition by imposing EU domestic content quotas. As even Primestar and Time Warner recognize, the UK has consistently interpreted the TVWF in ways favorable to entry by US programmers. As a result, a substantial number of American programmers hold UK licenses to provide satellite broadcasting signals and direct their European operations from the UK. Moreover, it is instructive to note that EU quotas are to be applied only "where practicable"

[Footnote continued]

that provides DTH service from a US-licensed satellite -- that have never been subject to foreign ownership restrictions in the past.

87/ The UK satellite market is one of the most open in the world for licensing satellite facilities, services and the programming they carry. There are no foreign ownership restrictions applicable to space station licenses generally, or to Non-Domestic Satellite Service licenses for providing DBS specifically. In the face of these facts, not even Time Warner and Primestar have argued that there are any de jure barriers to effective competition in the UK market.

and that the UK government has demonstrated its willingness to open the market to the greatest degree possible. Under the circumstances, punishing the UK for the TVWF would be arbitrary and unproductive.

III. CONCLUSION

For all of these reasons, the Commission should find that the Applicants have satisfied the ECO test and that the merger of MCI and BT is in the public interest. The FCC should dismiss the petitions to deny and promptly grant the Application.

Respectfully submitted,

MCI COMMUNICATIONS CORPORATION

By: Michael H. Salsbury

Michael H. Salsbury
Executive Vice President
& General Counsel
Mary L. Brown
Sanford C. Reback
Larry A. Blosser
MCI Communications Corporation
1801 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-3606

BRITISH TELECOMMUNICATIONS plc

By: Joel S. Winnik

Colin R. Green
Secretary and Chief Legal Adviser
British Telecommunications plc
BT Centre
81 Newgate Street
London EC1A 7AJ England

James E. Graf II
President
Joan M. Griffin
Cheryl Lynn Schneider
BT North America Inc.
601 Pennsylvania Avenue, N.W.
Suite 725, North Building
Washington, D.C. 20004

Joel S. Winnik
David J. Saylor
Hogan & Hartson L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109

Attorneys for
British Telecommunications plc

Dated: February 24, 1997

CERTIFICATE OF SERVICE

I, Kathy Bates, a legal secretary with the law firm of Hogan & Hartson L.L.P., hereby certify that on this 24th day of February, 1997, a copy of the foregoing Opposition & Reply was delivered to the parties listed below.

Kathy Bates

Dated: February 24, 1997

Chairman Reed E. Hundt*
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

Commissioner James H. Quello*
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

Commissioner Susan Ness*
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

Commissioner Rachelle B. Chong*
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

William F. Caton*
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

John Nakahata*
Senior Legal Advisor
to Chairman Reed Hundt
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

Jackie Chorney*
Legal Advisor to Chairman
Reed Hundt
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

Pete Belvin*
Senior Legal Advisor
to Commissioner Quello
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

* Hand Delivered.

James Coltharp*
Special Advisor
to Commissioner Quello
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

Rudolfo M. Baca*
Legal Advisor to Commissioner Quello
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

James L. Casserly*
Legal Advisor to Commissioner Ness
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

David R. Siddall*
Legal Advisor to Commissioner Ness
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

Daniel Gonzalez*
Legal Advisor to Commissioner Chong
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

Suzanne Toller*
Legal Advisor to Commissioner Chong
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

Joseph Farrell, Chief Economist*
Office of Plans and Policy
Federal Communications Commission
1919 M Street, N.W., Room 822
Washington, D.C. 20554

Greg Rosston*
Deputy Chief Economist
Office of Plans and Policy
Federal Communications Commission
1919 M Street, N.W., Room 822
Washington, D.C. 20554

Robert M. Pepper, Chief*
Office of Plans and Policy
Federal Communications Commission
1919 M Street, N.W., Room 822
Washington, D.C. 20554

Elliot Maxwell, Deputy Chief*
Office of Plans and Policy
Federal Communications Commission
1919 M Street, N.W., Room 822
Washington, D.C. 20554

William E. Kennard*
General Counsel
Federal Communications Commission
1919 M Street, N.W., Room 614
Washington, D.C. 20554

David H. Solomon*
Deputy General Counsel
Office of General Counsel
Federal Communications Commission
1919 M Street, N.W., Room 614
Washington, D.C. 20554

James Olson, Chief*
Competition Division
Office of General Counsel
Federal Communications Commission
1919 M Street, N.W., Room 658
Washington, D.C. 20554

* Hand Delivered.

Thomas Spavins*
Chief Economist
Competition Division
Office of General Counsel
Federal Communications Commission
1919 M Street, N.W., Room 658
Washington, D.C. 20554

James Earl*
Competition Division
Office of General Counsel
Federal Communications Commission
1919 M Street, N.W., Room 658
Washington, D.C. 20554

Larry Spiwak*
Competition Division
Office of General Counsel
Federal Communications Commission
1919 M Street, N.W., Room 658
Washington, D.C. 20554

Don Gips, Chief*
International Bureau
Federal Communications Commission
2000 M Street, N.W., Room 800
Washington, D.C. 20554

Diane Cornell, Division Chief*
Telecommunications Division
International Bureau
Federal Communications Commission
2000 M Street, N.W., Room 800
Washington, D.C. 20554

Roderick K. Porter, Deputy Chief*
International Bureau
Federal Communications Commission
2000 M Street, N.W., Room 800
Washington, D.C. 20554

James L. Ball*
Associate Chief (Policy)
International Bureau
Federal Communications Commission
2000 M Street, N.W., Room 800
Washington, D.C. 20554

Mindel De La Torre*
Deputy Chief
Telecommunications Division
International Bureau
Federal Communications Commission
2000 M Street, N.W., Room 800
Washington, D.C. 20554

George Li, Deputy Chief (Operations)*
Telecommunications Division
International Bureau
Federal Communications Commission
2000 M Street, N.W., Room 800
Washington, D.C. 20554

Troy Tanner, Chief*
Policy and Facilities Branch
Telecommunications Division
International Bureau
Federal Communications Commission
2000 M Street, N.W., Room 800
Washington, D.C. 20554

Thomas Wasilewski, Chief*
Multilateral and Development Branch
Telecommunications Division
International Bureau
Federal Communications Commission
2000 M Street, N.W., Room 800
Washington, D.C. 20554

* Hand Delivered.